BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

FRED L. CHILES Claimant VS. **SHARPLINE CONVERTING, INC.** Respondent AND **LM INSURANCE CORPORATION** Insurance Carrier	)	Docket No. 1,055,073

ORDER

STATEMENT OF THE CASE

Respondent and its insurance carrier (respondent) appealed the June 16, 2011, preliminary hearing Order entered by Administrative Law Judge (ALJ) Nelsonna Potts Barnes. R. Todd King, of Wichita, Kansas, appeared for claimant. John M. Graham, Jr., of Kansas City, Missouri, appeared for respondent.

The ALJ appointed Dr. John A. Pazell as a neutral physician to perform an evaluation of claimant for the purposes of diagnosis, causation opinion and treatment recommendations, if any. The ALJ did not make a specific finding that claimant met with personal injury by accident arising out of and in the course of his employment. Nor did the ALJ make a specific finding that claimant gave timely notice of the accident. No benefits were ordered paid to claimant.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the June 16, 2011, Preliminary Hearing and the exhibits, together with the pleadings contained in the administrative file.

ISSUES

In its Application for Review, respondent contends the ALJ exceeded her jurisdiction in ordering the IME evaluation and in failing to decide the notice defense in favor of the respondent. Respondent was silent on whether claimant's injury arose out of and in the

course of his employment. Claimant argues good cause exists for extending the notice provision of K.S.A. 44-520 to 75 days from the date of accident and that if the notice period is extended, timely notice was given.

(1) Does the Board have jurisdiction of respondent's appeal of the ALJ's appointment of an independent medical examiner?;

(2) If so, did claimant provide respondent with timely notice of his work-related accident?

FINDINGS OF FACT

After reviewing the record compiled to date and considering the parties' arguments, the undersigned Board Member finds and concludes:

Claimant was the only witness to testify. He testified the accident occurred on February 4, 2011, at 12:05 a.m. Claimant was leaving work at the end of the shift and exited the building to go to his vehicle. After going through the door, he slipped on ice and fell. Claimant fell backwards, landing on his buttocks, back and shoulders. His head did not strike the ground. Approximately a week later claimant began experiencing symptoms. He testified that it took him one week after the accident to realize he was injured.[1] He walked differently and his arms felt differently.

Claimant saw his family doctor, Dr. Val J. Brown, Jr., on February 14, 2011. He reported his balance being off, stumbling, weakness, and numbness in his upper arms. Claimant did not tell Dr. Brown about the fall at work. Although Dr. Brown believed, claimant's problems were not cardiovascular, but referred claimant to Dr. Pronab K. Sensarma, who had implanted a Pacemaker in claimant in 2009, to be cleared from a cardiovascular standpoint. Dr. Brown took claimant off of work. Claimant has not worked since February 10, 2011.

Dr. Brown saw claimant again on February 22, 2011. His notes indicate claimant was showing up a lot in the ER because of parathesias, dysenthesias and poor balance. Dr. Brown indicated claimant may be expressing stress in physical terms. Claimant was to return to work on February 28, 2011, without restrictions. Claimant is a severe stutterer and has difficulty expressing himself. Claimant did not tell Dr. Brown about the fall at work during this visit.

Dr. Brown referred claimant to Dr. Burtram J. Odenheimer, a neurologist certified by the American Board of Neurology. Dr. Odenheimer recommended numerous tests including a CT brain scan. His impression was, "Bilateral pyramidal tract dysfunction,

[1] P.H. Trans. at 10, 25-26 and 30.

possibly bilateral cerebellar dysfunction, possibly cognitive dysfunction in someone who has been having symptoms since at least 2009 and according to his wife may have started after placement of his permanent pacemaker. I wonder about bilateral strokes, perhaps SBE, vasculitis, multiple sclerosis, central nervous system infection, paraneoplastic disease, MS, or perhaps some type of neurodegenerative disease."[2] Claimant testified he told Dr. Odenheimer about the fall at work. Dr. Odenheimer's report does not reflect this.

Claimant saw Dr. Brown a third time on March 15, 2011. Claimant alleges that at this visit Dr. Brown was told about the fall at work.

Dr. Jonathan T. Morgan, a neurosurgeon, performed neck surgery on claimant, on May 2, 2011. However, the only medical records from Dr. Morgan in evidence, is a short letter entitled "Return To Work" dated May 18, 2011, which indicates claimant is to remain off of work. No other reports from Dr. Morgan were made part of the record. Nor was testimony elicited from claimant concerning the reason for the surgery.

It is uncontroverted that claimant first gave notice of the accident to respondent on March 15, 2011.[3] Claimant gave the following testimony as to why he waited until March 15, 2011, to give notice:

> Q. (Mr. King) Well, when you made the decision to talk to your employer on March 15th, I guess my ultimate question is, what was it that - - what new information or what revelation did you have prior to March 15th that made you realize, I am injured, I better tell my employer? What triggered that in your mind?
>
> A. (Claimant) Oh. I - - I got to thinking about that I still had time to do that, just - - just to be safe, you know, and then that's when - - around that time I contacted your office.[4]

PRINCIPLES OF LAW

The Board's jurisdiction to review a preliminary hearing order is limited. K.S.A. 2010 Supp. 44-551(i)(2)(A) in part states:

> If an administrative law judge has entered a preliminary award under K.S.A. 44-534a and amendments thereto, a review by the board shall not be conducted under this section unless it is alleged that the administrative law judge exceeded the administrative law judge's jurisdiction in granting or denying the relief requested at the preliminary hearing.

---

[2] *Id.*, Cl. Ex. 3 at 2 (Dr. Odenheimer's Mar. 10, 2011 report).

[3] *Id.* at 12.

[4] *Id.* at 27.

K.S.A. 44-534a(a)(2) states in part:

> Upon a preliminary finding that the injury to the employee is compensable and in accordance with the facts presented at such preliminary hearing, the administrative law judge may make a preliminary award of medical compensation and temporary total disability compensation to be in effect pending the conclusion of a full hearing on the claim, except that if the employee's entitlement to medical compensation or temporary total disability compensation is disputed or there is a dispute as to the compensability of the claim, no preliminary award of benefits shall be entered without giving the employer the opportunity to present evidence, including testimony, on the disputed issues. A finding with regard to a disputed issue of whether the employee suffered an accidental injury, whether the injury arose out of and in the course of the employee's employment, whether notice is given or claim timely made, or whether certain defenses apply, shall be considered jurisdictional, and subject to review by the board. . . Except as provided in this section, no such preliminary findings or preliminary awards shall be appealable by any party to the proceedings, and the same shall not be binding in a full hearing on the claim, but shall be subject to a full presentation of the facts.

In *Allen*,[5] the Kansas Court of Appeals stated:

> Jurisdiction is defined as the power of a court to hear and decide a matter. The test of jurisdiction is not a correct decision but a right to enter upon inquiry and make a decision. Jurisdiction is not limited to the power to decide a case rightly, but includes the power to decide it wrongly.

When the record reveals a lack of jurisdiction, the Board's authority extends no further than to dismiss the action.[6]

By statute, preliminary hearing findings and conclusions is neither final nor binding as they may be modified upon a full hearing of the claim.[7] Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted

---

[5] *Allen v. Craig*, 1 Kan. App. 2d 301, 303-04, 564 P.2d 552, *rev. denied* 221 Kan. 757 (1977).

[6] See *State v. Rios*, 19 Kan. App. 2d 350, Syl. ¶ 1, 869 P.2d 755 (1994).

[7] K.S.A. 44-534a; see *Butera v. Fluor Daniel Constr. Corp.*, 28 Kan. App. 2d 542, 18 P.3d 278, *rev. denied* 271 Kan. 1035 (2001).

by K.S.A. 2010 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board as it is when the appeal is from a final order.[8]

ANALYSIS

An order for an IME under K.S.A. 44-516 is not a finding of compensability. The ordered examination is not medical treatment. Thus, it is neither a preliminary award of benefits entered under the preliminary hearing statute, nor is it a final award. The Board has previously held that an order for an IME is an interlocutory order.[9] K.S.A. 2010 Supp. 44-551(i)(1) limits the Board's jurisdiction to review of "final orders, awards, modifications of awards, or preliminary awards under K.S.A. 44-534a and amendments thereto made by an administrative law judge . . . ." The Board concludes the Preliminary Decision entered by the ALJ is interlocutory in nature.

In general, a decision or order is final only when it resolves all issues between the parties and reserves no further question for future action. However, the Board has recognized an exception to this general rule.[10] In *Skahan*,[11] the Kansas Court of Appeals set out three criteria whereby an order may be final even if it does not resolve all issues between the parties. The order may be final if it (1) conclusively determines the disputed question, (2) resolves an important issue completely separate from the merits of the action, and (3) is effectively unreviewable on appeal from a final judgment.

An order referring a claimant for an IME does not satisfy those three criteria, however, as the order does not conclusively determine the disputed question of whether claimant suffered personal injury by accident that arose out of and in the course of her employment with respondent. Nor does the Order address the issue of timely notice. Those remain issues for the Judge to determine once an independent medical evaluation report is received. Indeed, it may remain an issue when the claim is ultimately submitted to the Judge for a final determination.

---

[8] K.S.A. 2010 Supp. 44-555c(k).

[9] *See*, *e.g.*, *Scott v. Total Interiors*, No. 244,761, 2000 WL 1134444 (Kan. WCAB July 28, 2000); *Kitchen v. Luce Press Clippings, Inc.*, No. 228,213, 1999 WL 288895 (Kan. WCAB Apr. 2, 1999).

[10] *Rhodeman v. Moore Management*, No. 234,890, 1999 WL 1008029 (Kan. WCAB Oct. 12, 1999).

[11] *Skahan v. Powell,* 8 Kan. App. 2d 204, 206, 653 P.2d 1192 (1982); *Scales v. Shawnee Gardens Nursing Center*, No. 1,021,953 and *Scales v. Presbyterian Manors, Inc.*, No. 1,021,954, 2005 WL 3030764 (Kan. WCAB Oct. 11, 2005).

CONCLUSION

Because it is an interlocutory order, the Board does not have jurisdiction to review the ALJ's decision to order an IME. Because the ALJ did not decide that issue, the Board is without jurisdiction to review the issue of whether claimant gave timely notice of the accident.

WHEREFORE, the undersigned Board Member that this appeal of the June 16, 2011, Order referring claimant for an independent medical evaluation entered by Administrative Law Judge Nelsonna Potts Barnes is dismissed.

IT IS SO ORDERED.

Dated this ____ day of August, 2011.

THOMAS D. ARNHOLD
BOARD MEMBER

c: R. Todd King, Attorney for Claimant
John M. Graham, Jr., Attorney for Respondent and its Insurance Carrier
Nelsonna Potts Barnes, Administrative Law Judge